TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 778

DAVID H. RYAN, APPELLANT,

vs.

THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MARCH 3, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 774

DAVID H. RYAN, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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[fol. 1]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

No. 15668

DAVID H. RYAN, Plaintiff,

vs.

STATE OF WASHINGTON, Defendant

APPEAL FROM ORDER OF STATE TAX COMMISSION—Filed September 6, 1934

Comes now the plaintiff and appeals to the above entitled court from an order of the Tax Commission of the State of Washington as follows:

I

That plaintiff is a citizen and resident of the State of California.

II

That on or about December 30th, 1933, plaintiff entered into a contract with the United States Government, Department of the Interior, for the performance of certain excavation work within the territorial limits of the State of Washington upon what is generally known as and called the "Coulee Dam Project".

III

That title to all of the land upon which said work was performed by plaintiff under said contract had been acquired by the United States, or was being acquired by condemnation proceedings by the United States, for the sites of locks, dams, keepers' dwellings and other necessary structures required in the improvement of the rivers of this state and necessary for the purposes of the United States Government and the people thereof.

[fol. 2]

IV

That the principal place of business of plaintiff in the State of Washington during the performance of said con-

tract was located entirely upon and within the confines of the lands so acquired and held by the United States, and work performed by plaintiff under the contract with the United States above referred to was a necessary part of the construction by the United States of a dam across the Columbia River with the necessary locks, keepers' dwellings, power houses and other structures and buildings of all kinds necessary for the development of electric energy and irrigation for the use and benefit of the citizens and residents of the United States.

V

That the sole business and occupation and source of income of the plaintiff within the State of Washington since January 1st, 1934, has been from and in connection with the performance of his contract with the United States Government hereinbefore referred to.

VI

That on or about June 4th, 1934, the tax commission of the State of Washington issued its order #1001, assessing plaintiff in the sum of $4012.25 as the amount alleged to be due from him to the State of Washington for and on account of occupation tax and penalties under Chapter 191 of the Laws of 1933 of the State of Washington and amendments thereto, and that on June 11th, 1934, plaintiff made payment of said amount to the State of Washington.

[fol. 3]

VII

That within twenty days after date of the notice of such assessment plaintiff filed his petition in writing with the said Tax Commission of the State of Washington for a hearing upon said order of assessment and for a refund of the total amount so paid and after said hearing and on August 9th, 1934, the said tax commission made and entered its order, denying said petition, a true copy of said order being hereto attached, marked exhibit "A" and made a part hereof.

VIII

That plaintiff denies that said tax of $4012.25, or any part thereof, is or was due and owing by him to the State

of Washington under Chapter 191 of the Laws of 1933 of the State of Washington and amendments thereto, or otherwise, and hereby appeals from the said order of August 9th, 1934, and each and every part thereof, and alleges that said tax so assessed to and paid by him should be abated and the total amount thereof so paid refunded to him for the following reasons:

a. That Section 8326-5 of Remington's Revised Statutes of Washington provides for the exemption from this tax of gross income derived from sales to the United States Government, referring in said Section to subdivision 2f of Section 8326-2, which said subdivision refers to the business of "selling services, professional or otherwise".

That in carrying out of said contract with the United States Government, this plaintiff sublet to others the performance of all of the work required to be done under said contract, and that the proceeds or income received by plaintiff are the results of the sale of his services to the United States in the supervision and planning of the performance of said contract and that such proceeds or income are wholly exempt from said tax.

[fol. 4] b. That said tax is illegal, unconstitutional and void, being contrary to the provisions of the 14th amendment to the Constitution of the United States.

c. That the lands acquired by the United States by purchase and/or condemnation included in the site of the said Coulee Dam Project, under the provisions of Section 8108 of Remington's Revised Statutes of Washington and subdivision 17 of Section 8, Article I of the United States Constitution, are under and within the exclusive jurisdiction of the United States, save for the right to serve civil or criminal process on persons being therein; that every part and parcel of income accruing to plaintiff within the State of Washington since January 1st, 1934 has arisen out of and been derived entirely from services and business rendered and transacted entirely upon the said lands belonging to and/or being acquired by condemnation by the United States, and that the State of Washington has no jurisdiction to assess any tax against the proceeds of any business, occupation or services operated, transacted, rendered or performed thereon.

Wherefore, plaintiff prays that the order of the tax commission of the State of Washington made and entered in this matter on August 9th, 1934 be reversed; that said tax be held illegal and void and that the same be abated, and that the sum of $4012.25 so assessed to and paid by him be ordered refunded to him by the defendant herein, and that he have judgment further against the defendant for his taxable costs and disbursements herein incurred.

Luby & Pearson, Brown & Weller, Attorneys for Plaintiff.

[fol. 5] *Duly sworn to by David H. Ryan. Jurat omitted in printing.*

Copy received 6th day of Sept. 1934. T. S. Hedges, Tax Commissioner.

[File endorsement omitted.]

[fol. 6] IN SUPERIOR COURT OF THURSTON COUNTY

DAVID H. RYAN, Plaintiff,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the Tax Commission of the State of Washington, Defendants

COMPLAINT—Filed October 21, 1935

Comes now the plaintiff and for cause of action against the defendant alleges:

I

That he is now and at all times herein mentioned was a resident and citizen of the state of California.

II

That the above named defendants now are and at all times herein mentioned were the duly appointed, qualified, and acting tax commissioners of the state of Washington.

III

That the United States now is and at all times herein mentioned was engaged in the construction of a dam across the Columbia River at a point in said river where it constitutes the dividing line between Grant County and Okanogan County in the State of Washington; that the said United States has acquired by purchase and/or condemnation title to the necessary lands for the purpose of the construction of said dam and for the sites of keepers' dwellings and other necessary structures required in the improvement of said river and necessary for the development of electric energy and irrigation, for the use and benefit of the citizens and residents of the United States.

[fol. 7] IV

That on or about September 1st, 1934, plaintiff entered into a contract with the United States Government, Department of the Interior, for the construction of a railroad, connecting with the Northern Pacific Railway Company track at Odair, Washington, and running thence to the site of the dam being constructed across the Columbia River hereinbefore referred to.

V

That the sole and necessary purpose for the construction of said railroad by the United States Government is and was for the assistance and use furnished thereby in the construction of said dam and other works appurtenant and necessary thereto and for the beneficial use thereof after said dam and appurtenant works are completed.

VI

That title to all of the lands upon which said railroad construction work was performed by plaintiff under said contract had been acquired for said purpose by purchase by the United States.

VII

That the defendants herein, as the tax commission of the State of Washington, have made demand upon plaintiff that he furnish reports of the amounts received by him from the United States in payments for the performance of said contract, in compliance with Chapter 191 of the Laws of 1933 of the State of Washington and amendments thereto, and Chap. 180 of the Laws of 1935 of the State of Wn., and

have threatened to begin action against plaintiff to recover an occupation tax from plaintiff on account of such receipts by him under said contract, if payment is not made.

VIII

That the lands upon which said contract was performed by plaintiff are not within the jurisdiction of the state of Washington, and that the demand of defendants upon plain-
[fol. 8] tiff for payment of tax on account of moneys received by plaintiff under said contract with the United States Government is without right and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, plaintiff prays that the defendants herein, as the members of the tax commission of the State of Washington, be perpetually enjoined from assessing and from collecting or attempting to collect from plaintiff any tax based on his receipts from the United States on account of the performance of said contract for the building of said railroad; that plaintiff have judgment against defendants for its taxable costs and such further relief as may be just and equitable herein.

Luby & Pearson, Brown & Weller, Attorneys for Plaintiff.

Duly sworn to by E. D. Weller. Jurat omitted in printing.

[fol. 9] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 16294

DAVID H. RYAN, Plaintiff,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the Tax Commission of the State of Washington, Defendants

ANSWER—Filed October 22, 1935

Come now defendants above named and answering plaintiff's complaint, allege, admit and deny:

I

Deny the allegations contained in paragraph one of plaintiff's complaint and allege that at all times material to the performance of the contract involved in this case and to the prior contract for the removal of the over-burden at the Grand Coulee Dam, plaintiff was a resident of the state of Washington with offices either in Spokane or Coulee City, Washington, from which he conducted the necessary business in the performance of these contracts.

II

Admits the allegations contained in paragraph 2 thereof.

III

Admits the allegations contained in paragraph 3 thereof except that defendants allege that title to all lands necessary for the completed project have not yet been acquired.

IV

Admits the allegations contained in paragraphs 4, 5, 6 and 7 thereof.

[fol. 10]

V

Denies the allegations contained in paragraph 8 thereof.

Wherefore, Having fully answered plaintiff's complaint, defendants pray the same be dismissed and that they have judgment for their costs.

G. W. Hamilton, Attorney General. E. P. Donnelly, Assistant Attorney General.

Duly sworn to by E. P. Donnelly. Jurat omitted in printing.

[fol. 11] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

Statement of Facts—Filed January 6, 1936

Excerpts from the Statement of Facts Line 30, page 7, to line 22, page 22, incl. Line 5, page 49, to line 11, page 60, incl. #26060.

[fol. 12] STIPULATIONS AS TO FACTS

It is stipulated in open court between the attorneys for plaintiffs and attorneys for the State of Washington that the facts in this case are as follows:

That Mr. Ryan, the plaintiff, is and was at all times during the time he was engaged on this contract, a citizen of the state of California and his domicile was there, his legal residence. He was actually in the state of Washington during the performance of the contract, but his legal residence was in California at all those times.

Mr. Donnelly: In an instance like that there might be an additional fact that I would like to put in. Should we do it now as we go along? For instance, in regard to the fact that he maintained his office at Spokane, or shall I state that later?

Mr. Weller: In view of the fact that the law did not go into effect until January 1st and he was actually down there before that time, I don't think that would be material in this case. He was on the ground at all times while this law was in effect.

Mr. Donnelly: It might be material in view of the position we take in the first case.

The Court: Well, I suggest Mr. Donnelly, that you permit counsel to state his facts covered in the stipulation, and if you have any additional facts or you desire to change it in any way, you can take it up afterwards. You can make a note of it as you go along, and it will save confusion.

Mr. Weller: I will state, Your Honor, for the purposes of the record, what I do not consider a necessary fact, that prior to the commencement of actual work under this contract Mr. Ryan had his office in the Davenport Hotel at Spokane, Washington; that he, while there, entered into certain sub-contracts with sub-contractors who actually did the work; that he removed his office to the Dam site where it was upon land acquired by the Government and that is and will be actually used by the Government in this project, [fol. 13] where his office remained during the entire construction work, or excavation work by him, he having moved his office down there about the middle of December, 1933.

That the contract with the Department of the Interior was actually entered into by Mr. Ryan about December 30th, 1933. That the title to all of the land upon which all of the work was performed by the plaintiff under said contract

had been acquired by the United States Government by purchase prior to the commencement of said work by plaintiff or was being acquired by the United States Government by condemnation thereof in the District Court of the United States for the Eastern District of Washington at Spokane, Washington, for a site for the dam across the Columbia River, together with keepers' dwellings, power houses, and other structures and buildings of all kinds necessary for flood control, improvement of navigation, development of electrical energy, and irrigation.

That all of the land on said project upon which the work of the plaintiff was done and performed was above high water mark of the Columbia River and was necessary for and will actually be used by the United States Government in the construction of said project; and that the work performed by plaintiff under said contract with the United States Government was a necessary part of the construction of said project. That during the period of performance of said contract and the receipt of income therefrom by plaintiff, his sole and principal place of business in the state of Washington was located entirely upon and within the confines of the land so acquired and held by the United States, with the exception that he had his office in Spokane until about the middle of December, 1933.

That plaintiff sold merchandise, consisting generally of gasoline, oil, greases, tires, automobile parts and accessories, the income therefrom being included in and part of [fol. 14] the assessment referred to in the notice of appeal and that all of said merchandise was stored, sold, and payment received by plaintiff entirely upon and within the confines of the land so acquired and held by the United States, such sales being made by plaintiff in connection with, but not as a part of, his contract with the United States.

That the sole business, occupation and source of income, of the plaintiff within the state of Washington since January 1st, 1934, until the completion of said contract, has been from and in connection with the performance of this contract with the United States Government, and the sale of merchandise herein used and referred to.

That plaintiff sub-let to others, the performance of all the work provided to be done under said contract. On June 4th, 1934, the Tax Commission of the state of Washington issued its order numbered 1001 assessing plaintiff

in the sum of $4,012.25 as the amount alleged to be due from him to the state of Washington on account of the occupation tax and penalty and that on June 11th, 1934, plaintiff paid said amount to the state of Washington; That within twenty days after date of the notice of said assessment, plaintiff filed a petition in writing with the Tax Commission of the state of Washington for hearing upon the order of assessment asking for a refund of the amount paid by him; and that after the hearing, towit, on August 9th, 1934, the Tax Commission entered its order denying plaintiff's petition for a refund; and thereupon this appeal was taken from that order in accordance with the statute. Now, Mr. Donnelly, do you have some suggestions or changes that you wish to make?

Mr. Donnelly: Yes, Your Honor, in that connection some of the facts which I will want to stipulate, most of them indeed, will go to all three cases, and Mr. Graves has had prepared a map which will dispose of a lot of stipulated facts.

Now, how do you suggest that it will be possible to have the facts stipulated in another case considered in this case? [fol. 15] Mr. Graves: Well, you can just mention at the time the evidence is to be introduced that it is to be used in this case; and if we want to, later on, refer to it, we will adopt that by reference. The reporter can just incorporate the particular piece of evidence in both cases in the record in each of the cases. For instance, if you want to use this map now in this case, why you can use it in this case and we will agree, when it comes to the trial of our case, that it is also to be considered in our case.

The Court: I think that will be very satisfactory.

Mr. Graves: That is just to keep the record straight.

Mr. Donnelly: The defendant State of Washington assumes that the contract and specifications will be introduced in evidence and there will be no objection to that.

Mr. Weller: They will be. The stipulation as read, then, is agreeable to the State, is it, Mr. Donnelly?

Mr. Donnelly: With one exception that I will now mention. The stipulation doesn't refer to the identical contract and the stipulation number 3, or paragraph 3, counsel stipulated that the work was done upon property acquired or being acquired by the United States by condemnation in the District Court of the United States for the Eastern District of Washington at Spokane, where the site of the dam crosses

the Columbia River, together with keepers' dwellings, power houses and other structures and buildings of all kinds necessary for flood control, improvement of navigation, development of electrical energy and irrigation.

Now, Mr. Weller, there seems to be some conclusions in there, and I understand you have a certified copy of an actual petition which will be introduced in evidence.

Mr. Weller: Yes.

Mr. Donnelly: May we not stipulate, rather than have this conclusion, that the condemnation proceedings themselves may be agreed to be typical of all condemnation proceedings over there?

[fol. 16] Mr. Weller: We will so stipulate.

Mr. Donnelly: An argument may turn on some of these keepers' dwellings, railroads and so forth, and we will stipulate to the fact and they will be introduced in evidence as to the condemnation.

Then, with reference to the residence. The contract was performed by Mr. Ryan through sub-letting, sub-letting in two parts, one to M. S. Ross and one to Goodfellow Brothers. Both of those contracts were made at the office of Mr. Ryan in the Davenport Hotel in Spokane.

Mr. Weller: Yes.

Mr Donnelly: And prior to his going to the dam area for the performance.

Mr. Weller: Those two contracts were both executed prior to the 15th of December, 1933, and while Mr. Ryan still maintained his office at the Davenport Hotel in Spokane.

Mr. Donnelly: That after the starting of the work by the said contractors, Mr. Ryan maintained a staff to supervise that work.

Mr. Weller: That is correct.

Mr. Donnelly: At the area; that in accordance with the provisions of the contract he reported the payroll to the Department of Labor and Industries of his employees.

Mr. Weller: That is correct.

Mr. Donnelly: And that he also reported his payroll in connection with his business of selling gasoline and incidentals, personal property.

Mr. Weller: That is true.

Mr. Donnelly: That the tax, the amount of the tax you mentioned, covers the occupational tax on both phases, that is, the performance of the contract and——

Mr. Weller: I had that in my stipulation.

Mr. Donnelly: And on the business of selling.

Mr. Weller: Yes.

Mr. Donnelly: I think, then, that the defendant will stipulate to the stipulation as read by counsel with the corrections [fol. 17] that I have made, or additions.

Now, in addition to that, if the Court please, the defendant wishes to show or wishes to have stipulated with the consent of counsel that the actual performance of the work by the sub-contractors was upon property that had been acquired, I think, actually by condemnation, or was it by purchase?

Mr. Weller: By both.

Mr. Donnelly: By purchase and condemnation from private parties. That the work was above the high water mark of the Columbia River. That is, now, with sole reference to Ryan's first contract, being the removal of the over-burden on both sides of the river.

Mr. Weller: Yes.

Mr. Donnelly: And that the facts stipulated in the MWAK case, they may be stipulated in your case.

Mr. Weller: I think probably that would be the better way.

Mr. Donnelly: I may say to the Court that later in the stipulation the nature of the contract and the actual conditions will appear and such portions as we wish to be considered in the one case will be referred to. That will be with reference to the first contract.

Mr. Weller: Yes.

Mr. Donnelly: With the exception of such facts as we will stipulate later.

Mr. Weller: It probably will appear, if the Court please, that there may be additional facts as the case develops that it will be necessary to stipulate into the record, but I think there will be no dispute among counsel as to the facts. I have a little documentary evidence that I desire to introduce. First, plaintiff's identification A in cause 15668. Plaintiff's exhibit A is a copy of the contract and specifications and bond between Mr. Ryan and the Government in this case.

Mr. Donnelly: I have no objection to that.

[fol. 18] The Court: It may be admitted.

(Copy of contract and specifications and bond between plaintiff Ryan and the Government marked Plaintiff's A in cause 15668.)

Mr. Weller: Plaintiff's exhibit B is a certified copy from the Federal Court at Spokane, Washington, of a complaint and a declaration of taking and an order of taking in one of the condemnation suits of the land involved in this controversy. It is an order of possession instead of an order of taking.

Mr. Donnelly: We will stipulate that is typical of the procedure brought by the Government.

Mr. Weller: I will say to the Court there were a number of such condemnation suits and that the form of all the papers as certified there were the same in all cases. The same general form was followed.

The Court: It may be admitted.

(Certified copy from Federal Court in Spokane of the complaint and order of possession admitted and marked plaintiff's exhibit B in cause 15668.)

Mr. Graves: Mr. Reporter, please make a note there that the plaintiff in cause 15850, Silas Mason Company versus Tax Commission, will desire to have that exhibit incorporated in the record in their case. That was the last one only, the condemnation proceedings. I don't care anything about the contract with Ryan.

Mr. Donnelly: It may be stipulated that that is typical of the condemnation proceedings through the whole project.

Mr. Graves: Yes.

Mr. Weller: I think possibly I should offer to read into the record the act of Congress relating to rivers and harbors. It might not be accessible to the Court.

Mr. Graves: Well, just pass it up to the Court for his use. That will be all that is necessary.

[fol. 19] Mr. Weller: This is a copy of the Act relating to the approval of the dam site.

The Court: I presume it is for the Court's convenience in connection with your brief.

Mr. Weller: Yes, Your Honor. Now, I think that is our case in chief, Mr. Donnelly, and we rest.

Mr. Donnelly: With the exception of such facts as we may wish to incorporate in this case in subsequent stipulations, the State will rest.

Mr. Weller: Do you want to take your case up now, Mr. Graves.

Mr. Graves: Well, let us get the evidence in and then argue it all together.

Mr. Weller: Well, I mean the evidence.

Mr. Graves: I will have some evidence on our part of the case.

Mr. Weller: Probably I had better go ahead with the railroad case.

[fol. 20] Mr. Weller: This evidence now will be introduced in the case of Ryan versus the Tax Commission, number 16294. This is the copy of the contract and specifications and bond in the railroad construction case.

Mr. Donnelly: We will have no objection.

The Court: It may be admitted as Plaintiff's exhibit A, in this, cause number 16294.

(Copy of contract, specifications and bond admitted and marked Plaintiff's exhibit A in cause No. 16294.)

Mr. Weller: We shall also ask to have admitted in this case the certified copy of the condemnation proceedings because, if the Court please, this case necessarily depends upon the other. In other words, if we fail in the other case, naturally this would fall also.

The Court: It may be understood, then, that plaintiff's exhibit B in the former case is an exhibit in this case.

Mr. Weller: Yes, Your Honor.

(Certified copy of condemnation proceedings admitted in evidence and to be marked Plaintiff's exhibit B in cause No. 16294.)

Mr. Weller: I think that is all, Your Honor.

Mr. Donnelly: Now, have you checked the Complaint in the railroad case? I don't know, as a matter of fact; I presume they contain the same allegations of authority that they did in the first one.

Mr. Weller: Yes. We haven't stipulated in this railroad case yet, have we?

Mr. Donnelly: Well, I suggest that any extra stipulation you make now—— (interrupted)

Mr. Weller: Well, it will be stipulated between counsel for Plaintiff and for the Defendants in this case, number 16294, the same stipulation that was contained in cause

[fol. 21] number 15668; and in addition thereto the following:

That about September 1st, 1934, plaintiff entered into a contract with the United States Government, Department of the Interior, for the construction of a railroad connecting with the Northern Pacific Railway Company tracks at Odair, Washington, running thence to the site of the Grand Coulee Dam;

That the sole and necessary purpose for the construction of said railroad by the United States Government is and was for the assistance and use furnished thereby and in the construction of said dam and other works appurtenant and necessary thereto and for the beneficial use thereof after said dam and appurtenant works are completed; That the title to all of the lands upon which said railroad construction work was performed by plaintiff under said contract had been acquired for said purpose by purchase and/or condemnation by the United States Government and that the entire performance of said contract by plaintiff was had upon said lands so acquired.

That the plaintiff had his office upon lands other than those belonging to the United States Government acquired for the purpose of this railroad at the beginning of the construction of the railroad and later, possibly when the contract was about half done, he moved his office and living quarters, which were together, to the dam site where they were upon lands acquired by the Government for the purpose of the dam and the railroad.

That the defendants, the Tax Commission of the State of Washington, have made demand upon plaintiff that he furnish reports of the amounts received by him from the United States in payment of the performance of said contract under the occupation tax laws and have threatened to begin action to recover the tax.

[fol. 22] Now, is there anything further, Mr. Donnelly?

Mr. Donnelly: It will be stipulated also in that case that Mr. Ryan, in the performance of the contract, made the reports to the Department of Labor and Industries?

Mr. Weller: Yes, he did. I might state that he performed this contract himself and made his regular reports to the State of Washington, to the Department of Labor and Industries, and paid the premiums therefor.

Mr. Donnelly: And that the sub-contractors, such as they were, did the same thing.

Mr. Weller: Well, I think there were no sub-contracts in this case at all.

Mr. Donnelly: The conclusion that the entire performance of the contract by the plaintiff was had upon such lands so acquired, it will be stipulated to, and that the actual performance of the actual manual labor was done upon the right of way of a certain width that was either purchased or condemned by the Federal Government.

Mr. Weller: That is true.

Mr. Donnelly: The State maintains, however, that it would have been impossible to perform the contract entirely there and this will be shown by certain terms of it. In that connection it will claim that the office and supervision, the necessary supervision from the office, will be a part of the performance.

Mr. Weller: At the time the contract was actually let, Mr. Ryan's office was at the dam site and when that work was finished, and before he commenced the railroad construction, he removed his office to Coulee City where it was maintained for about half the performance of the railroad contract and then moved back to the dam site upon Government land.

[fol. 23] Mr. Donnelly: It will be stipulated that the railroad was completed for the dam purposes as now being operated by the MWAK Company in that connection?

Mr. Weller: Well, that is part of Mr. Graves' case rather than ours.

Mr. Donnelly: And that the right of way for the railroad is approximately thirty miles in length and is not shown upon the map which will be introduced in evidence in the MWAK Company case.

Mr. Weller: That is correct.

Mr. Donnelly: It is stipulated the Government did furnish it in accordance with the terms of the contract and, with one exception, the title has been acquired.

Mr. Weller: And that is being condemned.

Mr. Donnelly: The right of possession has been granted.

Mr. Weller: Yes, that is correct.

Mr. Donnelly: The allegation, Mr. Weller, that will be stipulated to that suit is about to be commenced, that is, it is understood to the extent if we make a demand in the

course of this action, the ordinary process of the court will be invoked against him; that is what you mean, is it?

Mr. Weller: Yes, and this action is brought for an injunction to prevent that.

Mr. Donnelly: Yes. In the first Ryan case, Mr. Weller, for what it is worth, will you stipulate that Mr. Ryan has sub-let the contract to Mrs. Paine or entered into some negotiations for that and that a lawsuit in the Superior Court of Spokane County was brought by Mrs. Paine for the damages which were recovered in that court?

Mr. Weller: That is true. I don't think it is material.

Mr. Donnelly: And that this was done from the office in the Devenport Hotel.

[fol. 24] Mr. Weller: Yes, that is correct. I don't think it is material at all, Mr. Donnelly.

Mr. Donnelly: Our position is that he was doing his work by subletting.

Mr. Weller: Yes, that is true.

Mr. Donnelly: Then, in the railroad case, we will call it, the State will rest with the addition of such facts as will be disclosed by the later stipulation.

Excerpt from the statement of facts, beginning at line 30, page 7, to line 22, page 22, inclusive.

Mr. Donnelly: Now, Mr. Graves, there is a slight change that you know of in the contract. Now, is it material?

Mr. Graves: I don't consider it material. If you wanted to get that properly, you would have to have an engineer testify.

Mr. Donnelly: The fact is that the original dam was let as a power project and the specifications of the MWAK contract were changed recently to lower and widen it, so that it is, in fact, a base for the ultimate higher dam which will be an irrigation project.

Mr. Graves: Yes, the Government reserved the right to make such changes as it desired in the contract, subject to adjustment.

Mr. Donnelly: Yes. The principal thing the State would like to stipulate with reference to the plaintiff MWAK exhibit C, the map and letter, will you correct me if I say anything wrong, Mr. Graves?

[fol. 25] Mr. Graves: Yes.

Mr. Donnelly: It will be stipulated that the map introduced in evidence as a part of exhibit C is correct, and that it correctly shows property acquired by the Federal Government for the work in progress. There is, however, no established reservation as such, either by the Secretary of the Interior or by Act of Congress and no plat with definite boundaries filed. The map shows the extent of the land acquired now in the vicinity of the dam itself.

In addition to this there is being acquired flowage lands above the dame on both sides of the river by the Federal Government. It is in the process of being acquired and a large lake for reservoir purposes will be made to the north, and, in that process, a great many thousand acres of land will be necessary, that is, for the ultimate project. That in this ultimate project there will be public land, probably largely privately owned land, some state and county lands, and some school lands. That the irrigation project, if and when completed, will involve a great many acres they refer to in their report to the south, but that is not being acquired at the present time. That there is contemplated to be acquired in the immediate vicinity of the property shown on the map, exhibit C, land for the power plant, That has not yet been acquired.

The tract of land numbered 4, Your Honor, and the letter which is part of exhibit C, exhibit C refers to Section 36 and in the letter it is described as section 36. Erroneously on the plat it is apparently 35. That should be and is section 36 and is a school section, section 36 being a school section of land.

The Court: It is described as 36 and marked 35 on the map?

Mr. Donnelly: 36 is correct, and in that connection, Your Honor, the engineers said it was reserved to the United States for the state of Washington under section 3380 of [fol. 26] Pierce's Code. We use Remington's mostly, 7410 and 7412. That is a matter of law, I suppose.

The two orange tracts I would like to have understood their nature, in case it becomes material. I think it may make some difference in our theory. They are described by the engineer as "tribal" lands. In that connection there has been at that point, at the very point of the dam, the Colville Indian Reservation. Is that correct?

Mr. Graves: I don't know.

Mr. Donnelly: The Colville Indian Reservation does not run there, I understand. That might make some difference in the title to the thread of the stream.

Mr. Graves: I think the Colville Indian Reservation is further down the stream.

Mr. Donnelly: Well, then it will be stipulated that the Indian Reservation does not affect any of the land on the map, exhibit C.

Mr. Graves: That is correct.

Mr. Donnelly: That the area described as "tribal" lands and shown on the map and colored in orange, the title is in the Federal Government for the Indians in some form or in the tribes.

Mr. Weller: Well, I don't know; that doesn't affect our case and I haven't investigated, so I couldn't say.

Mr. Donnelly: And that the Columbia River at that point is a navigable river.

Mr. Graves: Yes.

Mr. Donnelly: And that there are no conveyances directly from the state to the Federal Government except the reservation as to section 36, the school section.

Mr. Graves: I want to answer that with respect to the statement as to the acquisition of other lands, flowage rights and so forth.

[fol. 27] It is agreed that the land within the heavy boundaries here is all that is essential for the work that has been done and that is contemplated to be done in the near future. The flowage rights and any question involving other structures will be something arising in the future and are not involved in the present situation.

Mr. Luby: As a matter of fact, the engineers' notes produced in 1929 show that this additional acquisition of property and the building of other dams shall extend to the year 2000, so we can't speculate about that today.

Mr. Graves: I just wanted to be sure that in the present case all that is involved in the present case is within these boundaries.

Mr. Donnelly: I believe that is a little indefinite. I think we should stipulate to the facts, the land, that is, flowage lands and lands to create the pond are being acquired at the present time as the work progresses. The land is being acquired that is necessary.

Mr. Graves: Yes, that will be agreed. The United States is getting lands as it is necessary for its construction.

Mr. Donnelly: That the land to make the project feasible as a power project is now being acquired and a great deal of land in addition to what is shown on exhibit C has been acquired. Those are the facts.

Mr. Graves: Well, that is immaterial as we regard it, but the fact is as stated.

The Court: I don't see how it could have any bearing on the present inquiry, Mr. Donnelly.

[fol. 28] Mr. Donnelly: I wish to make the point that no definite reservation has been established on plat——

Mr. Graves: You understand, Mr. Donnelly, that the changes in this contract do away with the dam feature and make it merely a foundation for the high dam.

Mr. Donnelly: Yes, that is why I suggested you might want to stipulate that.

Mr. Graves: Well, that can be stipulated. That is the fact. The changes that are made do away with the construction of the dam that was contemplated by the original contract and provide for the construction of an enormous base which will sustain the high dam which it is contemplated will be ultimately erected and providing for the irrigation of all the big bend section.

The Court: We are only concerned now with the contract for building this foundation, as I understand it.

Mr. Graves: Yes, Your Honor.

Mr. Weller: It will also be stipulated that this change in the MWAK contract was made after the completion of the contract or contracts with Mr. Ryan. Is that correct, Mr. Donnelly?

Mr. Donnelly: I believe, after the completion of the railroad contract, yes.

Mr. Graves: What is to be constructed under this change is a part of a dam for the purposes defined in the specifications.

Mr. Donnelly: And we wish it specifically understood the land in section 36 colored in purple is being used by the contractor in the performance of this contract in the manner described. It will be stipulated that there are two regularly formed school districts in the area, one in the engineer's town and one in Mason City, under the laws of the state of Washington.

Mr. Graves: I didn't quite understand your statement, Mr. Donnelly.

Mr. Donnelly: I said it will be stipulated that there are [fol. 29] two regularly formed school districts in the area under the laws of the state of Washington, one in the government engineers' camp and one in Mason City.

Mr. Graves: Well, I don't see that it is material, but there will be no disposition to get away from that, Mr. Donnelly. I just wanted to inquire about the facts. You say there are two districts formed within these heavily marked lines?

Mr. Donnelly: Yes.

Mr. Graves: Subject to the objection as to its materiality, that is the fact.

Mr. Luby: Our contention is that it is immaterial, but probably it had better go in and if it becomes material, why, it will be in there.

Mr. Donnelly: I am advised by Mr. Schwellenbach that the district that is in the engineers' camp was established under the Bureau of Reclamation; that it required dissolution of a joint district and that this was done upon the petition of the Bureau; and that the actual status at the area,—Mason City, of course, is on this area—and it is built by the contractors as part of their contract.

Mr. Graves: The engineers' camp—may we not explain to the Court what that is?

Mr. Donnelly: Yes.

Mr. Graves: That is the camp that is maintained by the United States for the offices and residences of the officers of the United States, the engineers who are employed there, and it is entirely separate and distinct from the town of the contractors which is called Mason City. It is on the opp-site side of the river. So when engineer's camp is referred to it is understood to mean the land which is occupied by employees of the United States as distinguished from the contractors and their employees.

Mr. Donnelly: Now, I would like to stipulate as to the extent in which the counties involved actually participate [fol. 30] in the government of that area, for what materiality it may have. It will have some on our theory of the case and Mr. Schwellenbach is more familiar with that; maybe he could state it better than I.

Mr. Schwellenbach: That in Mason City the policemen who are employed by the Mason Company have been depu-

tized as deputy shariffs of Okanogan County; that Mr. Mallock, the attorney for the Mason Company located at Mason City, has been appointed a Justice of the Peace in Okanogan County; that Dr. Sorenson, one of the doctors in the Mason Hospital, has been appointed as a deputy coroner in Okanogan County; that prior to the enactment of the Steele law, a number of beer parlors were operating in this area in Grant County under permits issued by the county commissioners of Grant County; and that in the fall of 1933 one of these operators was fined in Justice Court for operating without a permit as provided in the ordinance; that on Christmas Eve of 1933 the sheriff and prosecutor of Grant County were called to the dam site on the complaint of one of the beer parlor operators and on the following day the man was brought into the Justice Court and convicted of assault in connection with this particular fight; that on January 26th, 1934, the sheriff of Grant County was called to the dam site on the complaint that an insane man was at large there. That is, I want it understood this is all within this area which is in controversy here.

That in November, 1934, the sheriff was called to the dam site in this area to investigate the theft of some water taps in the possession of a sub-contractor operating on this property; that about the same time the prosecutor was called there as coroner to investigate the accidental death of a man killed while working for Priek and Kinney, contractors, who were building the railroad highway on this property; that a man named Louis Kroll is operating a beer parlor right down on the river in this area and has been selling beer under a license issued to him by the Liquor [fol. 31] Control Board of the State of Washington; that at various times the coroner of Grant County has been called down to this area to investigate the accidental death of men who were employed by the contractors on this particular area.

Mr. Donnelly: You are the coroner?

Mr. Schsellenbach: Yes, in this particular area.

The Court: You are asking to have those facts stipulated?

Mr. Schwellenbach: Yes, Your Honor.

The Court: Do I understand they are agreed to, subject to their materiality?

Mr. Luby: Subject to raising that question at any time as to materiality.

Mr. Graves: I have no doubt in that country they rustle around considerably.

Mr. Donnelly: I would like to have it stipulated that the MWAK Company have regularly made applications to the Director of Licenses for the state of Washington for refund of the gasoline tax paid in the area on the grounds, among others, of operating trucks illegal for use on the highway and that they are over eight feet in width; and that, under the law as construed prior to the going into effect of the 1935 Act, refunds were regularly made to the MWAK of such gasoline taxes as were paid as were used in the machinery on the dam and trucks that were too large to operate on the highway.

Mr. Graves: Subject to the objection that it is immaterial, the facts are admitted.

Mr. Donnelly: That prior to the construction of the railroad from Odair to the dam site the contractors transported the materials by truck of such proportions that a special permit was required to operate on the public highway; and that such special permits were granted by the state authorities.

Mr. Graves: Subject to materiality, that is admitted.

[fol. 32] Mr. Donnelly: That there are two private corporations in Mason City, the Coulee Trading Company and the Mason City Company, which transact private business; which is the hotel and moving picture theatres and gasoline distributors and general merchandise business. That, as to private parties in Mason City, the appropriate state tax was collected and paid to the state, sales tax, admission tax, and that no sales tax is, in fact, collected on sales by this company to the Mason-Walsh Company in that area;

That the Mason-Walsh Company, operating its mess hall, collects the tax itself and pays it to the state on meals sold to other than employees of the company;

That the Mason-Walsh-Atkinson Company—I am not sure whether counsel has stated it—is qualified to do business in the state. They have qualified to do business in the state of Washington.

Mr. Graves: I think that is pleaded. All of this goes in subject to our objection as immaterial. The facts are agreed where we do not dissent.

Mr. Donnelly: Yes, I understand also that a great amount of this may be inadmissible that is in evidence already.

Mr. Graves: Yes.

The Court: Well, these questions will be raised at the time of the argument, no doubt, and considered by the Court.

Mr. Donnelly: Now, if the Court please, as to the amount of the evidence which Mr. Graves and I have stipulated I understand may be used in the Ryan cases. Under our theory of the case the state feels that the character of the reservation is in issue and we would like the stipulation as to the map to be a part of that and that the letter accompanying it and those stipulations be made a part of the Ryan case.

Mr. Weller: That may be done.

[fol. 33] Mr. Donnelly: Would there be anything wrong with stipulating so far as material in the MWAK case that the stipulations may apply in the Ryan case?

Mr. Weller: Well, the question in regard to that would be in the making up of the record, Mr. Donnelly. So far as the stipulations with Mr. Graves are concerned, I know that a good many of them are true and I don't question the truth of any of them; but a lot of them are not applicable to our cases. It might be rather difficult to make up the record unless we should stipulate that certain of those should apply in our cases.

Mr. Donnelly: Well, I went along here each time without calling attention to what cases, Mr. Weller.

Mr. Weller: It is agreeable to us that any of the matters which have been stipulated here which are applicable to the Ryan cases may be used in those cases. The only thing would be the difficulty of segregation.

Mr. Donnelly: Well, in general, we wish to show the area, the nature of the area, the map and the way it is actually used now.

Mr. Weller: So far as the map is concerned, that is perfectly agreeable to us; but, as Mr. Luby suggested, so many of the things which have been mentioned here happened after Mr. Ryan had completed his two contracts they could not affect him in any way.

Mr. Graves: As you introduced the evidence in the other cases, as we went along, I stated that I wanted included in this case, something that went into the Ryan case, I noted that.

Mr. Donnelly: Well, I believe if the State offers a daily transcript here of what has happened, that we can get at it later.

Mr. Weller: Yes.
Mr. Donnelly: And rest on the stipulation now as made.
Mr. Weller: That is satisfactory.

Excerpt from the Statement of Facts, Line 5, page 49 to Line 11, page 60, inclusive.

[fol. 34] 26060

EXCERPT FROM EXHIBIT "B"—DECLARATION OF TAKING

that said land is taken under the authority of the constitution and laws of the United States for the following purposes:

(1) Regulation and control of the flow of the Columbia River, a navigable stream of the United States, by means of a dam located at the Grand Coulee site and a storage reservoir above said site for use at said Grand Coulee site and at all the dam sites on the Columbia River below said Grand Coulee and all parts of said Columbia River from the Canadian Line to the mouth of said stream for the following purposes:

(2) Improvement of navigation;

(3) Flood control;

(4) Hydro-electric power development at said Grand Coulee site and at each of the proposed dam sites below the said Grand Coulee site as an aid and incident to the other purposes herein enumerated, including the increase of the amount of firm power which may be made available at each of the lower dam sites on said stream and the improvement of the feasibility of each of said proposed lower dams on the Columbia River as self-liquidating projects;

(5) Reclamation of arid and semi-arid land, including public land of the United States;

(6) Domestic use of water, including domestic use by entry-men on public lands;

(7) Relief of unemployment under the provisions of the Act of Congress of June 16, 1933 (48 Stat. 195) and particularly under Title II thereof.

Filed in the U. S. District Court, Eastern Dist. of Washington Jun 18, 1934, A. A. LaFramboise, Clerk, Eva. M. Hardin, Deputy.

Filed in Clerk's Office Supreme Court State of Washington Jan 13 1936 Benj. T. Hart Clerk, By Archie B. Stewart, Deputy.

Filed Superior Court Thurston Co. Wash. Oct 22 4:32 PM 1935 Ellis C. Ayer, Clerk by B. Chambers, Deputy.

Plaintiff's Exhibit No. b Thurston County Cause No 15668. Date Admitted Oct 22/35 also Ex B in 16294.

[fol. 35] 26060

EXCERPT FROM EXHIBIT "A"

Article 21 of Exhibit "A"

Art. 21. Compensation Insurance.—The contractor will furnish compensation insurance for employees on this work and comply with the workmen's compensation laws of the State, Territory, or district in which the work is to be performed, and will give proof of such adequate insurance satisfactory to the contracting officer.

Plaintiff's Exhibit No. A. Thurston County Cause No. 15668.

Date Admitted Oct. 22/35.

Filed Superior Court Thurston Co. Wash. Oct. 22, 4:32 P. M. 1935. Ellis C. Ayer, Clerk, by B. Chambers, Deputy.

[fol. 36] EXHIBIT "7"

(P. O. Draft; Oct. 20, 1933.)

United States

Department of the Interior

Bureau of Reclamation

Grand Coulee Project, Washington

Contract Between the United States of America and the State of Washington Acting Through the Columbia Basin Commission

This Agreement, made this first day of November, 1933, in pursuance of the act of June 17, 1902, (32 Stat., 388) and

acts amendatory thereof or supplementary thereto, referred to herein as the Reclamation Laws, and of the act of June 16, 1933 (48 Stat., 125) commonly known as the National Industrial Recovery Act, between the United States of America, represented by the Secretary of the Interior, and the State of Washington, represented by that certain agency of the said state known as the Columbia Basin Commission, created under Chapter 81 of the 1933 Washington Laws.

Witnesseth that:

2. Whereas brevity is desirable, the following are hereinafter styled as listed in Column I hereof, in lieu of the full name or title listed in column 2 hereof:

Column I	Column 2
United States	United States of America
Secretary	Secretary of the Interior
NIRA	National Industrial Recovery Act
State	State of Washington
Commission	Columbia Basin Commission
Project	Grand Coulee Project

and

3. Whereas, an allotment of $63,000,000 out of the fund appropriated under the NIRA has been made available for [fol. 37] the construction of a dam and power plant by the Reclamation Bureau at the Grand Coulee site on the Columbia River in the said state and such transmission lines in connection therewith as may be found necessary or desirable;

4. Whereas, the said dam to be constructed with said allotment constitutes the first unit and an integral part of a larger Grand Coulee Dam which is more fully described in the reports of the Chief of Engineers of the War Department and the Reclamation Bureau as set out and discussed in the "Hearings before the Committee on Irrigation and Reclamation of the House of Representatives of the Seventy-second Congress on the Columbia Basin Project, H. R. 7446", which said dam will provide about 5,000,000 acre-feet of storage capacity, create a lake 151 miles long extending from the Grand Coulee to the Canadian line, and serve as the diversion dam for said project and for improvement of navigation, flood control, power development, and ulti-

mately for irrigation, including the irrigation of public lands of the United States; and

5. Whereas, under appropr*o*ation made for that purpose by Congress, the Corps of Engineers, United States Army, have conducted exhaustive investigations of the Columbia River for the purpose of determining the best use of the said stream and its tributaries for the various purposes to which it is adapted, and have adopted a comprehensive and coordinate plan for the development and use of said stream for navigation, flood control and irrigation and for the development of electrical energy to pay the cost of the proposed construction and for irrigation pumping and industrial and domestic use; and

6. Whereas, the said comprehensive plan for the coordinated development of the Columbia River for navigation, flood control, power and irrigation includes the construction of a series of dams at various points on the Columbia River, [fol. 38] the uppermost of which is the said Grand Coulee Dam; and

7. Whereas, the said Grand Coulee Dam is the key structure in the comprehensive plan for the coordinated development of the said stream, in that the said Grand Coulee Dam will provide the necessary storage capacity to store the peaks of the Columbia River floods and, by storing the floods and releasing the stored water during the low water season, will improve the flow of said stream for navigation, power development and irrigation and will reduce the flood dangers on the lower part of the stream; and

8. Whereas, it is estimated that the storage to be made available behind the said Grand Coulee dam will about double the amount of firm power which can be developed at each of the proposed dam sites between the Grand Coulee and the mouth of the Snake River and will increase by about 50% the amount of firm power than can be developed at each of the several dam sites below the mouth of the Snake; and

9. Whereas, the said increased amount of firm power made possible at each of said lower dams by reason of the storage behind the Grand Coulee dam is an important factor in the feasibility of each of said lower dams as a self-liquidating project; and

10. Whereas, the said Commission has been created by the Legislature of said state as a state agency for the purpose of cooperation with the federal government in securing the construction of the said project and the said Grand Coulee dam;

Now, Therefore, it is hereby agreed:

11. Construction of First Unit.—Upon approval of the plans and specifications for the said proposed first unit dam of the project by the chief engineer of the reclamation bureau, the United States acting through the Reclamation [fol. 39] Bureau and under the direction of the secretary will expend the sum of sixty million dollars ($60,000,000) or so much thereof as the secretary shall find to be necessary for that purpose, in the construction of a dam and power plant at the said Grand Coulee site, the top of which dam will be approximately at elevation 1116, and spillway crest thereof, at approximately elevation 1085 feet above sea level, and will expend the sum of three million dollars ($3,000,000) or so much thereof as the secretary shall find to be necessary or advisable in the construction of transmission lines for marketing of the electrical energy to be produced at said dam.

12. Title to Constructed Works.—The United States will retain the title to the said dam and power plant and the operation and control thereof until the cost of the said project, including the cost of the said first unit dam and power plant, has been fully repaid into the treasury of the United States.

13. Commission to Act in Advisory Capacity.—The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.

14. Option to State.—The State, acting through the said Commission, or other duly authorized state agency, shall have an option, for a period of three and one-half (3 1/2) years from the date hereof, to purchase the perpetual right to the entire power output of the said first unit dam and power plant by issuing and delivering to the United States

valid general obligation bonds of the state in the amount of seventy per cent (70%) of the estimated cost of the said first unit dam, power plant and transmission lines as the said cost is estimated and announced by the secretary in the [fol. 40] manner hereinafter provided, subject, however, to the following terms, conditions and reservations. The principal of the said bonds shall come due in not to exceed 30 years and shall bear interest at the rate of four per cent (4%) per annum. It is further agreed that for a period of five years after the expiration of said three and one-half (3 1/2) years option period, the state shall have a further and additional option to purchase the said perpetual right to the entire power output of said first unit dam and power plant at the same price and upon the same terms and conditions applicable to said 3 1/2 year option; but subject to the additional condition, that if the state should exercise the option after the expiration of said 3 1/2 year period, then the state will take said power rights subject to any contracts for the sale of power from said plant which the United States may have made prior to the exercise of the option by the state and the rights, benefits, duties and obligations of the United States under such previously made power sale contracts shall inure to the benefit of and be binding upon the state as the successor of the United States thereunder.

15. Estimate of Cost of First Unit.—When the Commission shall have advised the secretary that the necessary legal authority has been secured to issue and deliver the said bonds and that the state desires to exercise the option provided for herein, the secretary will furnish the commission an estimate of the cost of the said first unit dam and power plant and the transmission lines to be constructed in connection therewith, based upon the costs theretofore plus an estimate of the cost of completing the said works, which statement and estimate of cost shall include all expenditures of whatsoever kind in connection with, growing out of, or resulting from the work described, including the cost of labor, material, equipment, engineering and legal work, superintendence, administration and overhead, right of way, [fol. 41] property, and damage of all kinds, and shall include all sums expended by the United States in surveys and investigations, both prior to and after the execution of this contract, the said estimate shall be in writing, duly signed

by the secretary, and shall be conclusive for the purpose of the option provided for herein.

16. Enlargement, Alteration, or Improvement of Works.—The United States reserves the right to enlarge, alter and improve the said first unit dam and to enlarge, alter, improve and modify the said power plant and to change the machinery therein to adapt the same to the higher head available from such enlarged dam, and to add other or additional power plants or power units, and the right to use the enlarged dam and the enlarged or modified power plant in connection therewith for all the purposes for which said larger dam is intended, including improvement of navigation, flood control, power development, and irrigation.

17. Right to Seasonal Power.—The United States reserves the right to such part of the seasonal power available from said enlarged dam during the irrigation season as way be needed for pumping water for the said project.

18. Estimate of Available Power.—In connection with the said estimate of cost to be furnished by the secretary, the secretary will also furnish as estimate of the amount of firm power and the amount of seasonal power which may reasonably be expected from said first unit dam and power plant, and after the construction of the enlarged dam and the improved or enlarged power plant the United States retains the right to all power or electrical energy which can be developed at said enlarged dam and power plant in excess of said estimate of power available from said first unit dam and power plant and after said enlargement the power rights of the state will be limited to the said estimated power output estimated to be available from said first unit [fol. 42] dam and power plant; but it is agreed and understood that enough of the seasonal power available from said enlarged dam and power plant during the irrigation season to supply the pumping requirements of the project is reserved by the United States even though such reservation should encroach somewhat upon the estimated seasonal power output of said first unit dam and power plant.

19. Payment of Operation and Maintenance.—If the state exercises the option herein granted and acquires the right to the power output of said first unit dam and power plant, the state will each year, in addition to the payment of the

principal and interest provided in said bonds, pay to the United States the cost of the operation and maintenance of the said first unit dam and power plant and transmission lines in connection therewith, as set out and determined by a statement of such cost to be furnished each year by the secretary to the commission until the enlargement of the said dam and power plant; and after the enlargement of said dam and power plant will pay a proportionate part of the cost of the operation and maintenance of the said enlarged dam and power plant, in proportion to the number of kilowatt hours of electrical energy secured by the United States and the state respectively from the said enlarged dam and power plant, and also a proportionate part of the cost of the operation and maintenance of such transmission lines as are used jointly by the United States and the state in proportion to the amount of electrical energy transmitted over such lines by each party. The said operation and maintenance charges shall be determined and paid in the following manner.

On or before December 1st of each year after the state has exercised the option granted herein and after power has become available from said first unit dam, the secretary will furnish the commission an advance estimate of the probable cost of the operation and maintenance of the said dam, [fol. 43] power plant and transmission lines for the coming calendar year from January 1 to December 31, inclusive, following next after the date of said estimate, and after the enlargement of said dam and power plant will also include in said advance estimate an estimate of the state's proper pro rata share of such operation and maintenance cost and expense according to the proportion herein provided for, which cost shall include all the elements of cost listed in article 15 hereof, and on or before January 1 following the date of said estimate, the state will pay to the United States the amount of the said estimated cost of operation and maintenance chargeable to the state as shown by and set out in said advance estimate, which shall be considered conclusive for this purpose.

Within ninety (90) days after the close of the year for which such payment has been made on such advance estimate basis, the secretary will furnish the commission a statement of the actual cost and expense of such operation and maintenance for the said past year, including all of the

items of expense listed in article 15 hereof, and after the enlargement of said dam and power plant will also include in said statement a statement of the state's proper pro rata share of said operation and maintenance cost, which statement by the secretary shall be considered conclusive for the purposes of this contract.

Within thirty (30) days after delivery of such statement of actual cost and expense of said operation and maintenance during the preceding year, the state will pay to the United States, or the United States will refund or credit to the state, such amount of money so that the total amount paid by the state to the United States as finally adjusted for each year's operation and maintenance of said works shall be the actual cost of the operation and maintenance of said works as shown by the said statement of actual cost up to the time of the enlargement of said dam and power plant, [fol. 44] and after the enlargement shall be the state's proper pro rata share of such actual cost as shown by said statement of actual cost.

20. Interest on Overdue Payments.—All charges herein agreed to be paid by the state to the United States which are not paid when due shall bear interest from the due date thereof until paid at the rate of six per cent (6%) per annum.

21. Default in Payment.—Should the state after exercising the option provided for herein, default in the payment of the principal or interest of said bonds or any part thereof, or any operation and maintenance charge herein agreed to be paid, the United States shall not be obliged to furnish any power to or for the state from said dam and power plant during the time that the state remains in default, and should such default continue more than two (2) years the United States may, at its option, by notice from the secretary to the commission, terminate all rights of the state and of the commission in said dam, power plant and transmission lines, and all rights of the state and of the commission under this contract as fully and completely as if this contract had never been made, but after such termination shall return said bonds to the state upon the payment by the state of all interest accrued thereon up to that time and all past due indebtedness of the state to the United States for operation and maintenance charges.

22. Rights if State Fails to Exercise Option.—Should the State decide not to exercise the option herein granted or allow the said option periods from the date thereof to elapse without the exercise of said option, the United States shall retain all rights in the said dam, power plant and transmission line and the power output thereof and the right to use, distrubute, sell or dispose of all electrical energy developed at said dam and power plant in such manner as the United States may deem best to pay the cost of the said project and accomplish the other purposes for which said project is intended.

[fol. 45] 23. United States not Liable for Damages.—The United States, its officers, agents or employees shall not be liable for damages when, for any reason, suspensions of the operation of the power system of the United States, or any part thereof, interfere with the delivery of electrical energy to the commission. The United States shall have the right to shut down its power plant and/or transmission lines and to cease the delivery of electrical energy temporarily whenever it shall be necessary to make repairs, replacements, or additions to its power plant, transmission lines, substations, dams or canals. Whenever possible, the United States will give reasonable advance notice of such temporary suspensions of service and will make all such repairs, replacements, and additions with diligence and will resume service without undue delay.

24. Rules and Regulations by Secretary.—The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dams, power plants and transmission lines and which are not expressly determined by law or the terms of this contract, and his decisions on such questions shall be conclusive.

25. Officials not to Benefit.—No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

[fol. 46] United States of America, by ——— ———, Secretary of the Interior. State of Washington, by The Columbia Basin Commission, by ——— ———, Chairman; by ——— ———, Secretary. (Seal.)

Attest: ——— ———.

Filed Superior Court, Thurston Co., Wash. Aug. 26, 10:00 A. M. 1935. Ellis C. Ayer, County Clerk. (In cause # 26059.)

Filed Superior Court, Thurston Co., Wash. Dec. 24 4:13 P. M. 1935 E. C. A. Ellis C. Ayer, Clerk, by ——— ———, Deputy.

[fol. 47] In Supreme Court of Washington

No. 26060

Thurston County No. 15668. 16294

David H. Ryan, Appellant,

vs.

The State of Washington, Respondent,

David H. Ryan, Appellant,

vs.

The Tax Commission of the State of Washington, Respondent

Judgment

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 10th day of December, A. D. 1936, on motion of G. W. Hamilton, Esquire, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said The

State of Washington and The Tax Commission of the State of Washington have and recover of and from the said David H. Ryan and from The Fidelity and Casualty Company of New York, surety, the costs of this action taxed and allowed at Seventy-Eight and 15/100 ($78.15) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Journal 33, page 270, records of the Supreme Court of the State of Washington.

[fol. 48] IN SUPREME COURT OF WASHINGTON

En Banc. No. 26060

DAVID H. RYAN, Appellant,

v.

THE STATE OF WASHINGTON, Respondent,

DAVID H. RYAN, Appellant,

v.

THE STATE TAX COMMISSION, Respondent

OPINION—Filed October 28th, 1936

Plaintiff brought these two actions seeking (1) the refund of an amount exacted from, and paid by, him as an occupation tax, and (2) an injunction to prevent the imposition against him of a subsequent tax of the same kind. Trial before the court, without a jury, resulted in a dismissal of both actions. Plaintiff has appealed.

The taxes imposed by the state in the first case were based upon the total amount of sales of merchandise made by appellant and also upon the total amount of gross income received by him in the performance of a federal government contract, all such sales and operations having been made and conducted within the area comprised in what is known as the Columbia Basin Project. The tax sought to be enjoined in the second case was based upon the total amount of gross income received by appellant in the performance of a second, and subsequent, federal government

contract operating within the same area. The principal question in the first case, and the only question in the second, is whether the state of Washington had any jurisdiction [fol. 49] within the territory of the project, sufficient to permit the state to impose and collect an occupation tax for services rendered therein by appellant to the federal government.

A brief history of the Columbia Basin Project will be of aid to a clearer understanding of the problem involved.

For a number of years, the people of this state have been actively interested in the development of the Columbia river and its tributaries. Between 1918 and 1932, many surveys and reports were made by engineers employed either by the state or else by the bureau of reclamation or the war department of the United States. These surveys and reports had relation to navigation, the development of hydroelectric power, and the reclamation of arid lands by irrigation. The state and its people were directly and particularly interested in, and concerned with, the features of power and reclamation. In 1932, the chief of engineers of the United States Army, after an exhaustive investigation, recommended a comprehensive plan for the improvement and development of the Columbia river for the purposes of navigation, flood control, power, and irrigation. The plan contemplated the ultimate construction of ten dams in the Columbia river, the first of which, together with a power plant, was to be erected at the head of Grand Coulee.

In 1933, the state legislature created the Columbia Basin Commission, consisting of five members, and authorized them to enter into contracts and to employ any and all means necessary to secure the immediate development of the Columbia Basin Project by means of the proposed Grand Coulee dam and the orderly development of the power, water, and soil resources incident thereto. Chapter 81, Laws of 1933, p. 376.

During this period of preparatory activities, the Grand Coulee dam and power plant had an indeterminate status, owing to the uncertainty as to whether the project would [fol. 50] be a state or a federal project. It seems that originally it was contemplated that the Columbia Basin Commission should at least carry on the necessary preliminary engineering. For that purpose, the Columbia Basin Commission obtained from the State Emergency Relief Commission an allocation of $377,000 of emergency relief funds.

This had the effect of tying in the project with the matter of emergency relief work, which was seriously engaging the attention of this, and of other states, at that time.

On June 30, 1933, the Columbia Basin Commission, in pursuance of its plan, entered into a contract with the United States, represented by the Bureau of Reclamation, Department of the Interior, wherein the United States agreed to make the topographic surveys and explorative work and to prepare the designs and specifications for construction work on the dam, for which the Columbia Basin Commission agreed to pay an initial sum of $50,000 at the time of the execution of the contract and the balance of the allocation of $377,000 as the work progressed. It appears that, during the period with which we are here concerned, the greater part of the $377,000 was paid as agreed.

It soon became apparent, however, that the work of construction itself would be of such magnitude and the expense so great that its completion would require the intervention of no less an agency than the federal government itself, with the unlimited financial resources at its command. Consequently, steps were taken to have the Grand Coulee dam and power plant included in the federal public works program. After considerable effort, this was accomplished, and an allocation of sixty-three million dollars for the dam and power plant was made by the federal bureau commonly known as NIRA.

On November 1, 1933, the United States, represented by the Secretary of the Interior, and pursuant to the reclama- [fol. 51] tion laws and the National Industrial Recovery Act, and the state of Washington, acting through the Columbia Basin Commission, entered into a contract relating to the construction of the dam, power plant, and power transmission lines at the Grand Coulee site, under the comprehensive plan above mentioned.

Some of the provisions of that contract are of particular interest in this controversy. The contract began with a series of ten recitals. No. 1 referred to the fact that the allotment of sixty-three million dollars, appropriated by NIRA, had been made available for the construction of the dam and power plant. No. 9 recited that the increased amount of firm power made possible at the lower dams by reason of the storage behind the Grand Coulee dam was an important factor in making the lower dams self-liquidating. No. 10 referred to the fact that the Columbia Basin

Commission had been created by the state legislature for the purpose of co-operating with the federal government in securing the construction of the project and of the Grand Coulee dam.

The contract then set forth the articles of agreement by number. The first, which is numbered article 11, provided for the expenditure by the United States of sixty-three million dollars, or so much thereof as was found necessary, in the construction of a dam and power plant at Grand Coulee site. Article 12 provided that the United States should retain title to the dam and power plant until the cost of the project had been fully repaid into the treasury of the United States. Article 13 reads as follows:

"13. Commission to Act in Advisory Capacity. The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States *concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.*" (Italics ours.)

Then followed a number of provisions giving the state an option, for a period of eight and one-half years after the [fol. 52] date of the contract, to purchase the perpetual right to the entire output of the dam and power plant, upon the conditions set forth in detail therein. Article 24 reads as follows:

"24. Rules and Regulations by Secretary. The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dam, power plants and transmission lines *and which are not expressly determined by law* or the terms of this contract, and his decisions on such questions shall be conclusive." (Italics ours.)

At this point, appellant's first connection with the project appears. On November 29, 1933, appellant, a resident of San Diego, California, entered into a contract with the United States for the excavation of overburden at Columbia river dam site, Columbia Basin Project, "Washington," for the sum of $534,500. The specifications, attached

to and made a part of the contract, provided, among other things, that the appellant should obtain all required licenses and permits, should give preference, after ex-service men, to citizens who were residents of the county and state in which the work was to be performed, should furnish compensation insurance in compliance with the laws of the state wherein the work was to be done, and should comply with all applicable provisions of federal, state, and municipal safety laws and building and construction codes.

Appellant entered upon the execution of the work under the contract about January 1, 1934, and completed it in the summer of the same year. During the entire performance of the work, appellant maintained his office and living quarters within the territory of the project as hereinafter designated.

After the completion of that contract, appellant, on July 18, 1934, entered into a second contract with the United States, which was for the construction of a railroad at Grand Coulee dam, Columbia Basin Project, "Washington," for the sum of $235,570. The railroad was to be 34.5 [fol. 53] track miles in length, extending from the Northern Pacific Railway tracks at Odair, Washington, to the dam site. The specifications in this contract contained the same provisions as those to which we have specifically referred above. The actual residence of appellant, for about one-half of the time during which the second contract was being performed, was at Coulee City, which is outside of the territory of the project, and for the remainder of the time was at the dam site, on government land which had been obtained in the manner hereinafter described.

On July 16, 1934, which was two days before the execution of appellant's second contract, the United States entered into a contract with Silas Mason Company, Inc., and others, for construction work on Grand Coulee dam and power plant, Columbia Basin Project, "Washington," for the sum of $29,339,301.50. The last mentioned contract contemplated work on a gigantic scale, as is indicated by the figures just given. That contract, however, did not include the work to be done by appellant under either of his contracts.

We make reference, at this time, to the contract of Silas Mason Company, Inc., for the reason that out of it grew an action similar to the two involved here. Silas Mason Co.

v. State Tax Commission, ante, p. —. That action and these two were tried in the superior court at the same time and, by stipulation of the parties, all the evidence, insofar as it was material, was considered as applying to all three cases. The respective appeals were argued in this court on the same day, upon records containing identical statements of facts.

The specifications attached to the contract of Silas Mason Company, Inc., provided, among other things, and in addition to what has already been mentioned, that the contractor should make all necessary arrangements with the proper state and county authorities for school facilities, and that [fol. 54] police protection for the contractor's camp and the area involved in and surrounding the construction work would be furnished by the Washington State Patrol in cooperation with the federal government, but that the contractor should provide, at its camp site, such jail facilities as were satisfactory to the Washington State Patrol.

The area included in the entire project above mentioned does not specifically and satisfactorily appear from the record, and we are unable to say exactly how much land is included therein. It does appear, however, that the area is very extensive, covering many acres of land on both sides of the Columbia river and including a railroad right of way 34.5 miles in length. There are two important things, however, to be noted in this connection. The first is that, during the time that the construction work was in progress, the United States, through condemnation proceedings brought against a number of individuals and corporations, acquired possession of, and title to, the various tracts of land now within the area of the project. A transcript of one of such condemnation proceedings, stipulated to be similar in form to all the others, is made a part of the record herein. It shows that the title to that particular tract was acquired by the United States on or after May 14, 1934, which was after appellant had commenced work. The other important factor to be noted is that, included in the area of the project, are school lands of the state and also tribal lands, all of which have been taken over by the federal government and now form a part of the project.

At the seventy-fourth session of the United States Congress, an act was passed authorizing the construction, repair, and preservation of certain public works on rivers and

harbors and for other purposes. The act ratified and validated all contracts and agreements that had been theretofore executed in connection with the Grand Coulee dam project. H. R. 6732, Public Act 409. The work contemplated [fol. 55] to be done upon the project by the United States was not in furtherance of any war measure or for the national defense, but simply for the improvement of navigation and for industrial recovery.

During the period of the construction work under his first contract, appellant maintained warehouses on ground within the project and at the dam site, where he stored and sold gasoline, oil, tires, and automobile accessories. Appellant paid the state a tax on these sales, the recovery of which forms a part of the basis of his first action.

At its regular session of 1933, the legislature of this state passed an act commonly known as the occupation tax act, chapter 191, Laws of 1933, p. 869, et seq. The act related to certain business activities "within this state." At its special session of 1933, the legislature amended the former act in certain respects. Chapter 57, Laws of 1933, Ex. Ses., p. 157 et seq. That act likewise applied to business activities "within this state." The latter act became effective January 18, 1934, which was shortly after appellant's first contract had been entered into, but before it was performed.

These two actions are in resistance to the application of either of these legislative acts to appellant's activities.

Appellant's first contention is that his construction or excavation contracts constituted sales of services, within the provisions of chapter 191, and that by § 5 of that act, read in connection with § 2 (2)(f), the proceeds of his contracts were exempt from the tax.

The answer to this contention is that the tax was not imposed under chapter 191 as it originally stood, but under chapter 57, § 1 (designated as § 2-a) (1), which clearly covers business activities of the kind engaged in by appel- [fol. 56] lant, if "within this state." This contention of appellant is but briefly discussed by either counsel, and, we think, merits nothing further than what we have already said.

The principal, and only remaining, question in the case is whether appellant's activities took place "within this state." Specifically stated, the contention of appellant is that, by virtue of the United States constitution and the

statutes of this state, the area contained within the project upon which the excavation and construction work was performed is under the exclusive jurisdiction of the United States, and that, therefore, any tax legislation of the state is wholly inoperative within the area of the project or upon any activities of appellant therein. Quotation of the specific constitutional and statutory provisions involved will first be made.

Art. I, § 8, clause 17, of the constitution of the United States provides that Congress shall have power:

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, *and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;* * * *" (Italics ours.)

Our reference to, and discussion of, this constitutional provision relate only to the latter, or italicized, portion of the quotation.

Rem. Rev. Stat., § 8108, adopted in 1891, provides that:

"The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, * * * the consent herein and hereby [fol. 57] given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of

America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

It will be observed that the statute, while somewhat broader than Art. I, §8, clause 17 in its designation of structures and purposes, nevertheless specifically recites that the consent therein given is in accordance with the constitutional provision.

The provision of Art. I, §8, clause 17, as above quoted and italicized, has been frequently construed by the United States supreme court, and it is now definitely settled and accepted that there are two ways in which lands within the jurisdiction of the state may become subject to the exclusive jurisdiction of the United States: (1) By purchase by the United States for certain specified purposes, with the consent of the state, and (2) cession of exclusive jurisdiction to the United States by the state. Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; United States v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761; Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091; Standard Oil Co. v. California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.

From these cases, the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within Art. I, §8, clause 17, by purchase with consent of the state, federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but [fol. 58] other than by purchase with the consent of the state, then federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is acquired for a purpose not within that clause,

but by purchase with the consent of the state, then the United States has such jurisdiction over the land as may be ceded to it by the state; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the state, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the state. Our ultimate problem herein will be to determine under which one or more, if any, of these classifications, the present case falls.

Manifestly, the construction work involved in this case does not come within any of the uses implied in the descriptive terms of the constitutional provision, unless it can be said to come within the term "other needful buildings." If the case were one of first impression, the rule of *ejusdem generis* would, in our opinion, exclude such work from the classification of "needful buildings" because the particular work was in no way connected with, or related to, forts, magazines, arsenals, or dockyards.

However, by judicial interpretation, over a long period of years, the term "needful buildings" has been applied to the following: a navy yard (Western Union Tel. Co. v. Chiles, 214 U. S. 274, 29 S. Ct. 613, 53 L. Ed. 994); a military hospital (Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447); a military reservation (United States v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761); an army training and mobilization station (Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091); a customs house (Sham v. Hill, 24 Fed. 726); locks and dams (United States v. Tucker, 122 Fed. 518); a post office (United States v. Andem, 158 Fed. 996); a penitentiary (Steel v. Halligan, 229 Fed. 1011); an Indian train-[fol. 59] ing school (United States v. Wurtbarger, 276 Fed. 753); a military cemetery (Wills v. State, 50 Tenn. 141); a soldiers' home (Sinks v. Reese, 19 Ohio 306); a courthouse (State v. Mack, 23 Nev. 359, 47 Pac. 62).

While the structures mentioned in the foregoing cases are not specifically named in, and do not strictly fall within, the constitutional classification, it is, nevertheless, apparent that the particular structures or "buildings" in those cases, with the possible exception of one, are such as would necessarily require absolute and exclusive jurisdiction in the United States government, because their operation is

in the discharge of a constitutional or governmental function, and there is no field for state participation or state legislation. The only possible exception in the list is the instance of locks and dams, involved in the Tucker case. But even in such case, if the locks and dams were owned and operated by the United States solely for the purpose of facilitating navigation, as they concededly were in that case, their function would likewise be a constitutional or governmental function. But irrigation, flood control, and power development (except insofar as the latter two are intended to promote navigation or else some war measure or the national defense), while they may be of national interest and serve a public purpose, are not functions enjoined upon the federal government by the constitution, nor are they delegated to the United States by the constitution, nor is it necessary that they be committed, for their operation, to the exclusive jurisdiction of the United States government. Legislative power, with reference to such things, is reserved in the state.

Turning, now, to the statute above quoted, we note that the state has given its consent to the acquisition, by purchase or condemnation on the part of the United States, of lands for sites of locks, dams, etc., as well as for the pur- [fol. 60] poses set forth in the constitutional provision. For present purposes, it may be conceded that the term "needful buildings" is broad enough, under the construction given to that term by the federal courts, to include locks and dams. It is very probable that specific mention of locks and dams was made in the statute in order to remove any doubt that may have existed generally at, and prior to, the time of the decision in the Tucker case, with respect to the inclusive extent of the constitutional provision.

The point that we make and stress here, and upon which we rest our ultimate conclusion herein, is that, while the statute conferred consent upon the United States to acquire land within the territory of the state, the state's power to cede jurisdiction is limited, by the statute, to those instances where it clearly appears that the land is to be used by the United States for a constitutional or governmental purpose. As stated in the leading case upon the subject, Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, supra:

"The essence of that provision [Art. I, §8, clause 17, United States constitution] is that the state shall *freely* cede the particular place to the United States for one of the specifically enumerated objects." (Italics ours.)

The question in this case, then, is whether, by reason of the conjunction of the constitutional provision, the statute, and the acquisition by the federal government of the lands within the project in the manner and for the purposes that the government acquired them, the state has been *ipso facto* deprived of all jurisdiction with respect to such lands. However close the question may seemingly be, we are of the opinion that the state has not been deprived of all jurisdiction, but that it has a concurrent jurisdiction to the extent, among other things, that it has the right to impose a tax upon business activities conducted within the area of the project. The reason for this conclusion is based upon what we conceive to be fundamental principles of law and the conducive facts of this case.

[fol. 61] By the enabling act of Congress, passed February 22, 1889, the territory of Washington became the state of Washington. Subject to the limitations and restraints of the federal constitution, the state, as such, has all the sovereign powers of independent nations over all persons and things within its territorial limits. Sturges v. Crowinshield, 4 Wheat. 122, 4 L. Ed. 529; New York v. Miln, 11 Pet. 102, 9 L. Ed. 648; Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356. The area within, and under, the jurisdiction of a state may come under the exclusive jurisdiction of the United States by purchase by the federal government for a purpose prescribed by the federal constitution and with the consent of the state, or by cession of exclusive jurisdiction by the state to the United States. In either event, the land acquires a territorial status and ceases to be a part of the state, either territorially or jurisdictionally. Concessions Co. v. Morris, 109 Wash. 46, 186 Pac. 655. But, since self-preservation is the first law of nations and states, as well as of individuals, it will not be presumed, in the absence of clearly expressed intent, that the state has relinquished its sovereignty. Wills v. State, 50 Tenn. 141; In re Kelly, 71 Fed. 545; Ex Parte Gibbons, 56 Ark. 277, 19 S. W. 602; Barrett v. Palmer, 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. 835, 17 L. R. A. 720 (Four of these cases are cited approvingly in the Concessions Co. case).

The power of taxation is an incident of sovereignty and inherent in the state, because government cannot exist or function without it. It is a legislative power following the more general power to make laws. State ex rel. Commissioners v. Clausen, 95 Wash. 214, 163 Pac. 744. The power of taxation is never to be suspended, surrendered, or contracted away. Amendment XIV, Washington constitution. In the absence of constitutional restraint, the power of the legislature over taxation is as unlimited as the subject with which it deals. State ex rel. State Tax Commission v. Redd, [fol. 62] 166 Wash. 132, 6 P. (2d) 619; 26 R. C. L. 27, §13. The taxing power of the state is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable. Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; 1 Cooley on Taxation (4th ed.) 159, §60.

This is not a contest between the federal government and the state as to jurisdiction. It is a contest between the state, asserting its concurrent, or partial, jurisdiction, and an individual who asserts that exclusive jurisdiction rests in the federal government. So far from there being any contest as to jurisdiction between the two sovereign powers, the record discloses that they are working in harmony and accord, each exercising the field for which it is the better equipped and each, at the same time, recognizing the field of the other. The federal government, therefore, cannot possibly be prejudiced by the result of this action.

It appears from what we have already stated that prior to, at the time of, and at all times since, the inception of the project, the United States and the state have cooperated in every way in the development and construction of the dam and power plant. The federal government at present furnishes the money, supervises the work, and will, for a time, maintain the operation of the project. The state, on the other hand, has furnished a large amount of money for the preliminary work and now, through the Columbia Basin Commission, acts in an advisory capacity to the federal government in the further progress of the work. The state also has an option to take over the entire project when completed. The federal government is involved in a huge undertaking, the object of which is to promote navigation, develop power, and provide for irrigation. The state is likewise concerned. Navigation is a function that comes

within the exclusive power of the federal government by virtue of the constitution of the United States. The devel- [fol. 63] opment of irrigation and of power for industrial purposes, however, is within the reserved powers of the state. There is, thus, every reason why the federal government and the state should co-operate, and, in order to do so, each must have proportionate jurisdiction.

"We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty." South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261.

On the other hand, if the state were excluded from all jurisdiction, the residents of the project would be without school facilities, police protection, and the right to vote, the workmen would be deprived of the benefit of industrial insurance, and the rules for sanitation would be suspended; for, if the state be wholly without jurisdiction, then it must follow that the state may not extend its privileges to the residents of the project nor expend its money in their behalf. Opinion of Justices, 42 Mass. 580; In re Town of Highlands, 22 N. Y. Supp. 137; Sinks v. Reese, 19 Ohio 306; State ex rel. Lyle v. Willett, 117 Tenn. 334, 97 S. W. 299; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091.

Furthermore, so far as the record supplies us with any information, the federal government did not acquire these lands until after the work of construction, under appellant's first contract, had been begun. Some of the lands, it appears, were not acquired until about the time that the work

under the contract was completed. The record discloses that when appellant entered into the second contract, although all of the lands had then been acquired, the state was exercising its jurisdiction within the project at the [fol. 64] instance of the federal government itself. Moreover, it does not appear from the record that the federal government ever set apart any definite reserve as constituting the project, but, rather, that it appropriated lands from time to time as the necessities of the project required; this fact may not be a controlling one, but is nevertheless entitled to consideration.

The facts, taken as a whole, argue conclusively, in our opinion, that the state never intended to cede, and the United States never intended to take, exclusive jurisdiction over the project. Facts consistent with the retention, and inconsistent with cession, of exclusive jurisdiction by the state should, in the absence of any assertion by the federal government to the contrary, be construed most strongly in favor of the state, to the end that its territory be not diminished and that its jurisdiction in matters in which the federal government is not directly or immediately concerned be not entirely lost.

We conclude, therefore, that the purposes of the project, taken as a whole, do not fall exclusively within any of the enumerated classes mentioned above, so as to give the United States exclusive jurisdiction over the lands, but, rather in a class where several purposes are so intermingled as to call for the exercise of jurisdiction by both the federal government and the state, according as their respective interests and duties require. Insofar as the legislative acts in question are concerned, they are operative upon the business activities of the appellant within the project.

[fol. 65] The judgments are affirmed.

Steinert, J.

We concur:

Millard, C. J. Main, J. Mitchell, J. Tolman, J.
Holcomb, J. Beals, J. Blake, J. Geraghty, J.

[fol. 66] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed January 15, 1937

Your petitioner, David H. Ryan, respectfully sets forth that on October 28th, 1936, the Supreme Court of the State of Washington, sitting at Olympia, Washington, made and entered a final judgment and order in favor of appellees and against your petitioner in the above entitled consolidated cases, which order and judgment dismissed both of said actions heretofore brought by your petitioner against said appellees. That the said Supreme Court of the State of Washington is the highest court of the State of Washington in which a decision in said cases can be had. Considering himself aggrieved by said final order and judgment of the said Supreme Court of the State of Washington the said David H. Ryan hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

[fol. 67] ASSIGNMENT OF ERRORS

The said David H. Ryan assigns the following errors in the record and proceedings in said cases: That the statute of the State of Washington imposing an occupation tax is unconstitutional and void as applied to the particular transactions stated in the complaints of appellant in this:

I.

The Supreme Court of the State of Washington erred in not holding that under Article I., Section 8, Clause 17 of the Constitution of the United States the United States had exclusive jurisdiction over lands within the territorial jurisdiction of the State of Washington acquired by the United States by purchase or condemnation with the consent of the State of Washington, under Section 8108, Remington's Revised Statutes of the State of Washington, for the purpose of construction of the Grand Coulee Dam, with necessary appurtenant buildings and structures, for

the improvement of navigation of the Columbia River, upon which lands so acquired and held the said David H. Ryan, appellant herein, performed all the work and received all the income on which the State of Washington had levied and seeks to levy an excise tax.

II.

The Supreme Court of the State of Washington erred in not holding that the United States had exclusive jurisdiction over lands within the territorial jurisdiction of the State of Washington acquired by the United States by purchase or condemnation for the purpose of the construction of the Grand Coulee Dam, with the necessary appurtenant buildings and structures, for the improvement of navigation of the Columbia River, jurisdiction over which was ceded to the United States by the State of Washington under Section 8108, Remington's Revised Statutes of the State of Washington, and upon which lands so acquired and held the said David H. Ryan, appellant herein, performed all the work and received all the income on which the State of Washington has levied and seeks to levy an excise tax.

[fol. 68]

III.

The Supreme Court of the State of Washington erred in holding that the said David H. Ryan, appellant herein, was liable to pay to the State of Washington an excise tax under Section 8370-1 et. seq., Remington's Revised Statutes of the State of Washington, Chapter 191, Session Laws of the State of Washington for 1933, as amended by Chapter 57 Extraordinary Session of 1933, on account of gross income received by him for work done and merchandise sold wholly upon and within the confines of land acquired by the United States by purchase or condemnation within the territory of the State of Washington with the consent of the State of Washington and with jurisdiction thereon ceded by the State of Washington to the United States by virtue of Section 8108 Remington's Revised Statutes of the State of Washington and in accordance with Article I., Section 8, Clause 17 of the Constitution of the United States, for the purpose of the construction of the Grand Coulee Dam for improvement of navigation of the Columbia River, together with the necessary buildings and structures appurtenant thereto.

IV.

The Supreme Court of the State of Washington erred in dismissing the action of appellant David H. Ryan herein:

First: To recover back money paid to appellee, The State of Washington, on account of an assessment made therefor by the Tax Commission of the State of Washington for excise taxes alleged to be due from said appellant, and,

Second: To restrain the appellees, the Tax Commission of the State of Washington and Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, constituting said Tax Commission, from collecting or attempting to collect any further excise taxes from appellant; on the ground that all income [fols. 69-72] earned and received by appellant within the State of Washington was so earned and received by him wholly upon and within the confines of lands acquired by the United States by purchase or condemnation with the consent of the State of Washington and with jurisdiction thereover ceded by the State of Washington to the United States under Section 8108, Remington's Revised Statutes of the State of Washington, and in accordance with Article I., Section 8, Clause 17 of the Constitution of the United States, and that the said action of appellees, State of Washington and its Tax Commission, in collecting and seeking to collect said tax is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant, David H. Ryan, of his property without due process of law and denies to him equal protection of the laws.

V.

The Supreme Court of the State of Washington erred in not holding that the occupation tax levied and collected or sought to be levied and collected by the appellees, being a tax upon the gross income of the appellant received under contracts with the United States, constituted a direct burden upon the United States and was therefore illegal and void.

PRAYER FOR REVERSAL

For which errors heretofore assigned appellant prays that the said judgment of the Supreme Court of the State of Washington dated October 28th, 1936, in the above en-

titled cause be reversed and a judgment entered in favor of said appellant, and for costs.

B. H. Kizer, Counsel for Appellant. M. J. Luby, E. D. Weller, Of Counsel. Address: 611 Paulsen Bldg., Spokane, Was-.

[fol. 73] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 15, 1937

The appellant in the above entitled actions having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered herein by the Supreme Court of the State of Washington on the 28th day of October, 1936, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction pursuant to the statutes and the rules of the Supreme Court of the United States,

It is Therefore Ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the above entitled cause, as provided by law,

It is Further Ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record herein in accordance with Rule X. of the [fol. 74] Rules of the Supreme Court of the United States and that he shall have same in the said Court within sixty days of this date.

It is Further Ordered that security for costs on appeal be fixed in the sum of $1000.00 and for supersedeas $1000.00.

Dated this 15th day of January, 1937.

Wm. J. Steinert, Chief Justice of the Supreme Court of the State of Washington.

[fols. 75-76] Bond on appeal for $2,000.00, approved and filed January 15, 1937, omitted in printing.

[fols. 77-78] Citation, in usual form, showing service on E. P. Donnelly, filed January 15, 1937, omitted in printing.

[fol. 79] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed January 19, 1937

To the Honorable Benjamin T. Hart, Clerk of the Supreme Court of the State of Washington:

It is Stipulated between counsel for appellant and appellees herein that you shall prepare and transmit to the Supreme Court of the United States under your hand and the seal of the Supreme Court of the State of Washington, in the manner and in the time required by the statutes of the United States, the rules of the Supreme Court of the United States, and the order allowing the appeal herein, a true copy of the material parts of the record herein, including the following:

1. Appeal from order of Tax Commission in Ryan vs. State.
2. Complaint in Ryan vs. State Tax Commission.
3. Answer in Ryan vs. State Tax Commission.
4. (a) That part of the statement of facts beginning at line 30, page 7, to line 22, page 22, and that part of the statement of facts beginning at line 5, page 49, to line 11, page 60.

(b) That part of certified copy of condemnation proceedings, being Exhibit "B", as follows: paragraph 3 of the com-[fol. 80] plaint, that part of declaration of taking, beginning with the words, "that said land is taken" and extending to bottom of page.

(c) Article 21 of Exhibit "A", being contract between David H. Ryan and United States.

(d) Exhibit 7 to amended complaint in your case No. 26059, being copy of proposed contract between the United States and State of Washington.

5. Judgment in Ryan vs. State.
6. Judgment in case of Ryan vs. State Tax Commission.

7. Opinion of Supreme Court of the State of Washington filed October 28th, 1936.
8. Petition for allowance of appeal, assignment of errors and prayer for reversal.
9. Statement as to jurisdiction.
10. Order allowing appeal.
11. Bond.
12. Citation.
13. Proof of service and notice of Rule 12, paragraph 3.
14. Stipulated præcipe for record.

It is Further Stipulated that any additional matters of record may be supplied by either party hereto that are deemed necessary, and that counsel may further stipulate in open court as to any other matters as to which information may be asked by the court.

B. H. Kizer, Counsel for Appellant. M. J. Luby, E. D. Weller, of Counsel. E. P. Donnelly, Counsel for Appellees.

[fol. 81] In Supreme Court of the United States

[Title omitted]

Stipulation re Original Exhibits—Filed February 9, 1937

It is hereby stipulated that the clerk of the Supreme Court of the State of Washington shall transmit to the clerk of the Supreme Court of the United States all of the original exhibits on file in the case of David H. Ryan vs. State of Washington, #26060, in addition to the record prepared according to the præcipe.

B. H. Kizer, Attorney for Appellant. E. P. Donnelly, Attorneys for Appellees.

Received Feb. 8, 1937, Attorney General's Office.

[File endorsement omitted.]

[fol. 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed March 3, 1937

Comes now the appellant and adopts his assignments of error as his statement of the points to be relied upon herein, and represents that the whole of the record as filed is necessary for the consideration of these cases.

Ben H. Kizer, Counsel for Appellant. M. J. Luby, E. D. Weller, of Counsel.

Copy received this 24th day of Jan., 1937. E. P. Donnelly, Attorneys for Appellees.

[fol. 84] [File endorsement omitted.]

Endorsed on cover: File No. 41,314. Washington Supreme Court. Term No. 774. David H. Ryan, appellant, vs. The State of Washington et al. Filed March 3, 1937. Term No. 774, O. T., 1936.